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No. 88-1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF RESPONDENTS

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President
for Public Policy
KNIGHTS OF COLUMBUS

Dated: October 26, 1989

KEVIN T. BAINE
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Amicus Curiae

* Counsel of Record

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BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an organization of 1.4 million members, and has a long history of advocating family rights and educational freedom. For example, *amicus* underwrote much of the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, many members of *amicus* are parents of children in public schools. *Amicus* is therefore greatly concerned that an erroneous view of this Court's precedents is re-

sulting in public school authorities censoring students' speech daily on the basis of its religious content.

All parties have consented to the filing of this brief.

STATEMENT

The Equal Access Act ("the Act"), 20 U.S.C. §§ 4071 - 4074 (Supp. V 1987), Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*, makes it unlawful for

> any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).[1] The constitutionality of the Act under the establishment clause was specifically considered by the Congress prior to its enactment, and the Act is premised on an express finding, made after extensive hearings and debate, "that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led, religious speech on the other." S. Rep. No. 357, 98th Cong., 2d Sess. 35 (1984); *see id.* at 9-10.

Neither of the lower courts in this case disagreed with that finding. The district court found "[u]nder the facts of this case" that students at Westside High School

[1] The Act codifies, for public high schools receiving federal funds, the result in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court held that permitting religiously oriented student groups to use university facilities on the same basis as other student groups would not violate the establishment clause. To the contrary, the Court held that *forbidding* such equal access would violate *students'* rights to freedom of speech and association.

("WHS") could distinguish between school-sponsored religious activity and student-initiated religious activity. Appendix to the Petition for Writ of Certiorari ("Pet. App.") B at 11-12 n.1. And the Eighth Circuit implicitly agreed. That court not only "accept[ed] Congress's fact-finding for purposes of the Act" (Pet. App. A at 20), it also held that "even if Congress had never passed the Act," *Widmar* v. *Vincent*, 454 U.S. 263 (1981), would require WHS not to discriminate against religious speech. Pet. App. A at 20. In so holding, the court of appeals necessarily resolved for itself, in the negative, the question left open in *Widmar*—namely, whether high school students are so much more "impressionable" than college students that the rule in *Widmar* would not apply to them. 454 U.S. at 274 n.14.[2]

SUMMARY OF ARGUMENT

This Court has traditionally accorded great weight to Congress's findings of legislative fact, even when those findings underlie important questions of constitutional law. The Court should accord similar weight to Congress's finding in this case that high school students are mature enough to distinguish between the religious speech of their fellow students and state-sponsored religion.

Indeed, there is no reason for this Court to disagree with that finding. The district court made a similar finding of fact. And the court of appeals not only accepted

[2] In *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986), the Court was presented with, but did not reach, the question whether *Widmar* applied to high schools. Four Justices, including Justice Powell, the author of *Widmar*, would have held that it did. The five Justices in the majority did not reach that question, finding instead that the respondent lacked standing.

Congress's finding, it indicated its own independent agreement with that finding by holding, in the alternative, that *Widmar* v. *Vincent*, 475 U.S. 263 (1981), applies to high school students. Moreover, Congress's finding was made after due deliberation, and both the plain text of the Equal Access Act and its legislative history demonstrate that Congress's finding was in no way pretextual.

Congress's finding does not conflict with this Court's precedents. Although the Court has opined that high school students are less mature than college students for purposes of formal classroom activities, the Court has never stated that they are so impressionable that all religious activity must be banished from public school premises. On the contrary, the Court has protected the First Amendment rights of individual students and has expressly left room for students' voluntary religious activities. Congress's finding also accords with the realities of modern public schools, which tolerate a wide variety of behaviors and ideas. It is simply unrealistic to assume that high school students will view all of those various, and sometimes conflicting, activities as sponsored by the State. In any event, it is at least as likely that students would view denying equal access to student religious groups as official hostility to religion, which is also forbidden by the establishment clause. Finally, the establishment clause cannot require the States to do the impossible and insulate students from the views of their peers. On the contrary, students' speech is affirmatively protected by the free speech and free exercise clauses.

ARGUMENT

Congress's express determination that high school students are mature enough to distinguish between the religious speech of their fellow students and state-sponsored religion is a finding of legislative fact, made after due deliberation, that is well within the competence of the Congress. As such, it should be accorded great weight. Indeed, because there is no reason—in either the facts of this case or the law—to disagree with that finding, it should be accepted by this Court.

I. THIS COURT HAS TRADITIONALLY ACCORDED GREAT WEIGHT TO LEGISLATIVE FINDINGS OF LEGISLATIVE FACTS

"Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform' . . . the Court accords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted). This "deference . . . is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Ibid.* It is, of course, this Court's "task in the end to decide whether Congress has violated the Constitution," and "legislative findings" do not foreclose the Court's "independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of California, Inc.* v. *F.C.C.*, 109 S.Ct. 2829, 2838 (1989). *Ibid.* Nevertheless, Congress's factual findings are entitled to some degree of "deference" and the Court does "not ignore" Congress's conclusions even on pure questions of constitutional law. *Ibid.* As the Court explained in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), the point is not that it wholly

> defer[s] to the judgment of the Congress . . . on a constitutional question . . . . The point is, rather, that when we face a complex problem with many

> hard questions and few easy answers, we do well to pay careful attention to how the other branches of the Government have addressed the same problem.

412 U.S. at 103. Thus, in that case, the Court stressed that it "must afford great weight to the decision of Congress and the experiences of the [Federal Communications] Commission" in regulating the broadcasting industry, even though the Court was faced with an important question under the free speech clause.[3]

In practice, the Court has often relied on Congressional factual findings that are dispositive of important constitutional issues. In *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966), the Court upheld § 4(e) of the Voting Rights Act of 1965, which nullified New York's English literacy requirement as applied to persons who had completed the sixth grade in accredited Puerto Rican schools, but who could not speak or write English. In upholding that statute under section five of the Fourteenth Amendment, the Court deferred to Congress's determination that

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[3] The Court has stressed that it must give particular scrutiny to Congressional conclusions that statutes do not violate the speech and press clauses. Thus, in *Sable Communications*, *supra*, the Court struck down a flat Congressional ban on all "indecent" dial-a-porn services, despite Congress's finding that such a ban was the only way to prevent "enterprising adolescents" from circumventing other barriers to their patronizing dial-a-porn services. *See also Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978) (overturning criminal conviction of newspaper under state statute criminalizing "divulging" proceedings of commission investigating charges of judicial disability or misconduct, and stating that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). *But see Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1978) ("afford[ing] great weight to the decision of Congress and the experiences of the" FCC on First Amendment questions). Here, of course, the Act does not limit any rights protected by the speech and press clauses. To the contrary, the Act affirmatively protects the free speech rights of students.

the "need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement," and that § 4(e) was therefore "appropriate legislation" within the meaning of section five of the Fourteenth Amendment. 384 U.S. at 658.

Whether Congressional action is authorized by the Fourteenth Amendment is, of course, quintessentially a question of constitutional law. Nevertheless, the Court emphasized that "[i]t was for Congress . . . to assess and weigh" the underlying legislative facts—"the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . ." *Id.* at 653. *See also id.* at 668 (Harlan, J., dissenting) ("[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect").

The Court has accorded similar weight to Congressional findings under the Commerce Clause. In *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), the Court upheld the constitutionality, under the Commerce Clause, of Title II of the Civil Rights Act of 1964. In doing so, the Court did not undertake its own independent evaluation of whether a local restaurant's refusal to serve blacks affected interstate commerce—the threshold constitutional question. Instead, the Court deferred largely to Congress's finding.

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory

> scheme necessary to the protection of commerce, our investigation is at an end.

379 U.S. at 303-304.

And in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court upheld, under the Due Process Clause, a ten-dollar ceiling on attorneys' fee awards for veterans claiming certain benefits from the Veterans Administration. The Court noted that the Senate had previously found that VA claim procedures were quite informal and generally did not require an attorney's assistance and that the ten-dollar ceiling was adequate. In *Walters*, as in the present case, Congress's findings coincided with those of the district court, and this Court therefore did not have to "determine what deference must be afforded" them. 473 U.S. at 30 n.12. Nevertheless, the Court stressed that

> [w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.

Ibid. See also Rostker, *supra* (upholding, under Due Process Clause, Congressional decision to require men, but not women, to register for the draft); *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (in equal protection case, "those challenging the legislative judgment must convince the Court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true").

Indeed, this Court has accorded great weight even to state legislative findings underlying constitutional issues. In *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), the Court upheld a state statute that established a new time limit for when certain mineral rights would be considered abandoned. Texaco argued that a two-year grace period provided in the statute gave insufficient notice of such a drastic change in the law, and thus violated the Due Process Clause. Whether a statute affords sufficient notice is inescapably a question of constitutional law. *See Lambert* v. *California*, 355 U.S. 225 (1957). Nevertheless, the *Texaco* Court stressed that it "shows the greatest deference to the judgment of state legislatures" on the question whether a given statute provides adequate notice of a change in the law. 454 U.S. at 532. Such deference is appropriate, the Court explained, because "[a] legislative body is in a far better position than a court to form a correct judgment" of the underlying legislative facts, such as "the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice." *Ibid. See also Brotherhood of Locomotive Firemen & Engineers* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138-39 (1968) ("The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion.").

II. THERE IS NO REASON NOT TO ACCORD SUCH WEIGHT TO CONGRESS'S FINDING THAT HIGH SCHOOL STUDENTS CAN DISTINGUISH BETWEEN STUDENTS' RELIGIOUS SPEECH AND STATE-SPONSORED RELIGION

In the present case, Congress found that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led religious speech on the other," S. Rep. No. 357, *supra*, at 35. That factual determination was no less within the competence of a legislature than the legislative determinations to which this Court gave great weight in *Texaco*, *Morgan* and *McClung*—whether citizens were given adequate notice of a change in the law (*Texaco*), whether literacy tests in voting were related to discrimination in

day-to-day governmental services (*Morgan*), and whether racial discrimination in local restaurants had an effect on interstate commerce (*McClung*). Accordingly, Congress's findings in this case should be accorded similar weight. And since there is no evidence that that finding was at all improper, it should be accepted by this Court.

A. Both Lower Courts Agreed With Congress's Finding.

The district court, "[u]nder the facts of this case," specifically rejected the argument "that high school students, as compared with college students . . . are more impressionable and more susceptible to believing that the school approves and promotes the religious activity" of some of its students. Pet. App. B at 11 n.1. The Eighth Circuit expressly "accept[ed] Congress's fact-finding" to the same effect. Pet. App. A at 20. The court of appeals also, however, noted its own independent agreement with Congress's finding. It held that "even if Congress had never passed the EAA, our decision would be the same under *Widmar* alone." *Ibid.* It thus resolved the question, left open in *Widmar*, whether high school students are too "impressionable" for the same rule to apply to them. 454 U.S. at 274 n.14. And it also noted and rejected the Ninth Circuit's contrary view that high school students' "impressionability," among other things, distinguished them from university students. *Id.* at 20, n.3.[4]

B. Congress's Finding Was Made With Due Deliberation.

The Congress's finding that high school students are capable of distinguishing between state-sponsored, and student-initiated religious speech was an express "exercise of [the Senate Committee's] fact-finding powers,"

[4] Under this Court's "two court rule" the lower courts' factual findings might thus be dispositive in their own right. *But see Bose, Corp.* v. *Consumers Union of the United States*, 466 U.S. 485 (1984).

made only after it held extensive hearings, received much evidence, and heard the testimony of many witnesses, including several high school students. S. Rep. No. 357, *supra*, at 10. For example, Professor Tribe testified that *Widmar* should protect high school students' religious speech. *Id.* at 8. *See also* Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elem. Sec. and Voc. Educ. of the House Comm. on Educ. and Labor, 98th Cong., 2d Sess. 45 (1984) (statement of Prof. Laurence H. Tribe). Professor Tribe added that he had "no doubt that Congress has the constitutional authority—and may even have a real . . . constitutional duty—to withhold federally appropriated funds" from school districts that discriminate against students' religious speech, *Ibid.*

A broad spectrum of individual supporters of the legislation agreed. For example, Rep. Roukema, who is a former high school teacher and school board member, disputed the notion that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students." To the contrary, she noted that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures . . . ." 130 Cong. Rec. 20,396 (1984). *See also id.* at 19,238-39 (remarks of Sen. Durenberger); *id.* at 19,239-40 (remarks by Sen. Biden).[5]

[5] There is ample support for Congress's conclusion in the psychological literature. One survey of such literature, which was cited by the Senate Committee, concluded "[g]iven the increased cognitive capacity and the psychological separation between the self and authority figures that occurs during adolescence, high school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear—even more clear, perhaps, than in later stages of life." Note, *The Constitutional Dimensions of Student-Initiated*

C. Both The Text Of The Act And Its Legislative History Demonstrate That Congress's Purposes Were Proper.

Both the text and the legislative history of the Equal Access Act demonstrate that in passing that Act, Congress was concerned only with vindicating students' rights, not with secretly establishing a religion. On its face, the Act protects not only religious speech, but also speech with "political, philosophical, or other content . . . ." 20 U.S.C. § 4071(a) (Supp. V 1987). And in practice, the Equal Access Act has been successfully invoked by non-religious student groups. *See Student Coalition for Peace* v. *Lower Merion School District Bd. of Directors*, 633 F. Supp. 1040 (E.D. Pa. 1986) (ordering school to permit use of gymnasium by student group promoting nuclear freeze).

This Court has frequently noted that a broad and facially neutral class of beneficiaries of a given statute dispels any notion that it constitutes an establishment of religion, even if a majority of those who choose to take advantage of the statute are religiously affiliated. The Court has stressed that it is "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller* v. *Allen*, 463 U.S. 388, 401 (1983). *See also Witters* v. *Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in the judgment and concurring in part) (where tuition assistance is available for study at a variety of schools, any resulting "aid to religion . . . is the result of [a student's] private choice. No reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief."); *Widmar*, 454 U.S. at 274 (state

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Religious Activity in Public High Schools, 92 Yale L.J. 499, 509 (1983) (citing psychological studies), cited in S. Rep. No. 357, *supra*, at 35.

forum "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval" on religious speech).

The legislative history of the Act is likewise clear. Congress passed the Equal Access Act not to establish a religion, but to "resolve the dilemma" many school administrators perceived in trying to reconcile the free speech and religious liberty guarantees of the First Amendment. S. Rep. No. 357, *supra*, at 3, 21. The Congress found that "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. No. 357, 98th Cong., 2d Sess. 6 (1984). These prohibitions, Congress found, were rooted in school administrators' "erroneous[] belie[f] that the establishment clause prohibits students from engaging in [religious] speech at all, even when other types of extracurricular student speech are permitted." S. Rep. No. 357, *supra*, at 6. As the Senate Report noted, this situation was resulting in both a widespread restraint of student speech, *id.*, at 14-15, and the diversion of scarce resources to litigation. *Id.* at 21.

D. Congress's Finding Is Not In Conflict With This Court's Precedents.

Congress's finding does not conflict with any decisions of this Court. While the Court has said that high school students are in general somewhat more "impressionable" than college students, it has never said that they are so impressionable that they must (or, indeed, constitutionally may) be hermetically sealed off from all aspects of religion. Quite the contrary, the Court has affirmatively left room for religion in public schools.

In striking down Alabama's moment of silence statute, the Court was careful to stress that a State's "intent to return prayer to the public schools is, of course, quite different from merely *protecting every student's right to engage in voluntary prayer* during an appropriate mo-

ment of silence *during the school day.*" *Wallace* v. *Jaffree*, 472 U.S. 38, 59 (1985) (emphasis added). Similarly, in *Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986), the four Justices who reached the merits would have held that the establishment clause permitted (and the free speech clause required) public schools to allow student-led Bible studies on the same basis as other extracurricular groups. Justice Powell, the author of *Widmar*, wrote, "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." 475 U.S. at 556 (Powell, J., dissenting). And three other Justices stressed that "utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform individual expression of religious belief into state advancement of religion." *Id.* at 553 (Burger, C.J., dissenting) (joined by White and Rehnquist, J.J.) (emphasis omitted).

The Court was likewise confident that the "released time" program approved in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), would not constitute an improper endorsement of religion. In *Zorach*, the Court upheld programs for releasing students, who were otherwise subject to compulsory attendance laws, from public schools for the sole purpose of attending religious instruction. The Court rejected a claim that such programs were necessarily coercive, noting that a "student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any." 343 U.S. at 311. "[T]he school authorities are neutral * * * and do no more than release students whose parents so request." *Ibid.*

By contrast, where the Court has sought to protect students' impressionability has been in formal classroom activities. Thus, the Court has prohibited public school teachers from affirmatively leading classroom prayer or Bible reading, *Jaffree, supra; School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962), from posting copies of the Ten Commandments, *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*), or from teaching religious dogma themselves or in concert with visiting teachers, *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).[6] The Court has also been exceedingly cautious about the use of state-supplied teachers or materials in religiously affiliated schools. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). But none of these cases is properly at issue here. Congress found only that high school students are mature enough to be able to distinguish the *extracurricular* religious speech of fellow students from religious coercion by the state. It did not address—one way or the other—whether high school students differ significantly from college students for purposes of formal classroom activities.

E. Congress's Finding Makes Good Sense.

Finally, Congress's finding accords with common sense. For better or worse, high school students must face a far more complex school environment than that which existed even twenty years ago. It is simply unrealistic to assume that they will view all of the various—and conflicting—behaviors and ideas tolerated in public schools as being endorsed by the State. As one high school student testified before Congress: "They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities.

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[6] Even so, however, the Court has presumed that courses in the history of religion or in the Bible as literature may be taught in public schools without fear that students will misperceive their purpose. *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963).

The same should hold for religious groups." *Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 64 (1983)* (testimony of Sarah Scanlon). *See also id.* at 60 (testimony of Bonnie Bailey); *ibid.* (testimony of Lisa Bender); Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elem., Sec. and Voc. Educ. of the House Comm. on Educ. and Labor, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

If high school students do manifest a particular susceptibility to others' ideas, it is generally not to the views of authority figures, but rather to those of their peers. And the establishment clause surely cannot require government to do the impossible—to insulate students from the ideas of their peers. Indeed, to the extent the state attempts to forbid students' private speech, it violates both the free speech clause and the free exercise clause. *See Tinker* v. *DesMoines Independent School Dist.*, 391 U.S. 503 (1969) (student's right to wear black armband protected under speech clause); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (students' refusal to salute flag due to religious convictions protected under the First Amendment).[7]

Finally, even if some high school students would view affording equal access to student religious clubs as endorsement of religion, at least as many, if not more, would surely construe forbidding such meetings as official hostility to religion. And that, of course, is also prohibited by the establishment clause. In fact, the Senate Committee found that "students reasonably perceive the

[7] *See also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983).

denial of access for religious speech as State hostility toward religion," S. Rep. No. 357, *supra*, at 36, and stressed that "its findings" were supported "by the testimony of the students themselves." *Id.* at 11, 19-20.

In sum, there is no factual, legal, or logical basis for questioning Congress's finding, and it should therefore be embraced by the Court.

CONCLUSION

The Equal Access Act does not establish a religion. It does nothing more than guarantee that students' extracurricular speech will not be censored for its political, religious or philosophical content. Moreover, as the Congress and both lower courts found, there is no constitutionally significant difference between high school and college students for purposes of the rule announced in *Widmar* v. *Vincent*. Accordingly, the Eighth Circuit's judgment should be affirmed.

Respectfully submitted,

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President
for Public Policy
KNIGHTS OF COLUMBUS

KEVIN T. BAINE
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Amicus Curiae

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* Counsel of Record